IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 510

KARL MULLER, FRANK KISSEL,
and HARRY STUBACK,

Petitioners,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

IRVING ANOLIK
ABRAHAM H. BRODSKY, and
HAROLD KRIEGER
Attorneys for Petitioners
225 Broadway
New York, N. Y. 10007
(212) 732-1322

Of Counsel
IRVING ANOLIK,
ABRAHAM H. BRODSKY,
KRIEGER, CHODASH & POLITAN

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No.

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—against—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Petitioners, Karl Muller, Frank Kissel, and Harry Stuback, respectfully pray that this Court issue a Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department, to review its affirmants of a judgment of the New York Supreme Court, County of New York, which convicted each defendant of the crimes of extortion, attempted extortion, and conspiracy, after trial before Gellinoff, J., and a jury. Concurrent sentences were imposed for the various crimes so that in effect Petitioner,

Muller, is serving three and a half to seven years imprisonment; Petitioner, Kissel, is to be incarcerated for seven and a half to fifteen years, while Petitioner, Stuback, will have to serve five to ten years.

Opinion Below

There was no opinion rendered by the New York Supreme Court, Appellate Division, First Department.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Sec. 1253. The Court of Appeals of the State of New York denied leave to appeal on May 5, 1970 and denied reargument on June 22, 1970. (See Appendices A and B). The order of the Appellate Division is at Appendix C.

Questions Presented

1. Whether the Petitioners were denied their constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments by virtue of the employment of wiretapping and eavesdropping in connection with the investigation leading up to the indictment herein?

2. Whether inordinant pre-trial publicity violated the Petitioners' constitutional rights under the Fourteenth Amendment to a fair trial?

3. Whether Petitioners received a fair trial under the Fourteenth Amendment in view of the fact that there was insufficient evidence as a matter of law to warrant a conviction for extortion under its definition pursuant to the New York statutes (compare sections 380(2) and 850, N.Y. Penal Law)?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are herein involved.

In addition, Sections 605 and 501 of the Federal Communication Act are also involved (47 U.S.C. Sec. 605, 501).

Article 1, Section 12 of the New York Constitution and Section 813(a) and Section 249 of the New York Code of Criminal Procedure, as well as Sections 738, 740 of the New York Penal Law and Sections 250.00, and 250.05 of the Revised New York Penal Law are, also germane.

Statement of the Case

The prosecution relied solely upon the crime of "extortion" under Sections 850 of the Penal Law, since as a matter of due process of law and as a matter of New York evidence, no conviction could be predicated upon the companion statute, namely Section 380(2) of the Penal Law involving bribery. The witnesses who testified against the Petitioners herein would all have been accomplices as a matter of law and thus no conviction could be obtained as a result of their uncorroborated testimony. (Section 399 of the Code of Criminal Procedure). Only bribery, not extortion, was proved.

The District Attorney frankly conceded that extensive electronic surveillance was conducted in connection with the investigation of the Petitioners herein. At no time was any Court Order introduced authorizing such surveillance. Some of this electronic surveillance was of the trespassory eavesdropping type, that is, "bugs" or listening devices were placed in the premises being used by the Petitioners for the conducting of their normal business.

The Petitioners herein were the president, secretary and vice-president, respectively, of Local 174 of the Amalgamated Meat Cutters Butchers Workmen of North America.

It was alleged that in connection with negotiations seeking to arrive at a contract in 1964, the Petitioners "extorted" $60,000.00 from the victims, namely, about fifteen or so of about 45 meat packers with whom the contract was being negotiated.

The labor committee of the Meat Trade Institute was negotiating this contract.

One of the essential elements of finding a conviction under Section 850 of the New York Penal Law is that *payment* must be "*induced* by a wrongful *use of force or fear*".

Every single witness who alleged that money had been paid to the defendants herein, confirmed that none of this money had been turned over until *after* a contract with the union had already been approved and ratified by the union itself by a vote of approximately 4,000 to 6.

Thus, it is urged that as a matter of law there could not have been any "force or fear" used in connection with the payment of this money since the alleged threat was that no contract would ever be approved unless and until the $60,000.00 was paid.

It was undisputed that Petitioner, Frank Kissel, at one point said with respect to the alleged $60,00.00, "You can shove it up your ass". (A271)*

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* Numerals in parenthesis refer to pages of the appendix used in the Court below unless otherwise indicated.

A perusal of the record will indicate that the money was apparently paid, at least in part, but that it was *given as a "bribe" and not under the force or fear necessary to make it "extortion"*.

POINT I

The District Attorney admitted that extensive electronic surveillance took place in connection with the investigation of the petitioners. Furthermore, it was conceded that much information about the petitioners was thus learned. No court orders were introduced, nor were any of the tapes themselves introduced into evidence. This violated the petitioners' rights under the Fourth, Fifth, Sixth and Fourteenth Amendments, as well as under similar statutes and constitutional provisions in the State of New York.

During the trial, the assistant District Attorney in charge openly admitted (A35):

> "The eavesdropping was extensive and it took place over some period of time over many locations, which I would like to list for the record, and although it was productive in some other areas, it had nothing to do with this indictment."

At another point the District Attorney admitted:

> Mr. Scopetta: That's right, Judge, yes unquestionably. The officers I would say undoubtedly made use of these wiretaps to keep track of defendants. They heard it, they may have been there, but I'm saying no observations were made of these defendants that affect this case."

It was the position of the District Attorney that since none of the tapes themselves were introduced into evidence, that therefore there was no prejudice to the Petitioners.

This, of course, completely overlooked the doctrine of "fruits of the poisonous tree" (*Nardone* v. *United States*, 308 U.S. 338).

In *Lee* v. *Florida*, 392 U.S. 378, the Supreme Court of the United States indicated that only by prohibiting the use of the evidence directly and indirectly, could respect be obtained for the statutes of the United States. The electronic surveillance in this case unquestionably was in violation of Sections 605 and 501 of title 47 of the United States Code. In other words, it *constituted a federal crime.* It should be further noted that *the mere revelation of the fact that electronic surveillance, namely wiretapping, took place is sufficient to invoke the penalties of that statute.* The disclosure of the existence of electronic surveillance through wiretapping constitutes a violation of the statute.

Motions had been made to dismiss the indictment based upon this, but of course they were denied.

On the issue of "standing", see *Mancusi* v. *DeForte*, 392 U.S. 364. The petitions have standing.

It should be noted that it is the "possibility" of prejudice that controls and not actually a demonstration that unequivocal prejudice was wrought by the electronic surveillance. (See *Chapman* v. *California*, 386 U.S. 18, 24). *Chapman* is important from the standpoint of recognizing that the District Attorney admitted that electronic surveillance of a substantial nature occurred and that it enabled the police authorities to keep track of the defendants. The gratuitous statement by the assistant District Attorney that the observations did not affect "this case" are not conclusive. The Court should have granted the motion to dismiss the indictment. For example, the testimony of Special Agent Pennypacker of the F.B.I. in *United States* v. *Black*,

C.R. Nos. 551-63, 650-63, D. C. December 18, 1967, transcript page 610, reveals the following which is very significant herein:

> "... during the course of the investigation I might send a lead out to an office and make reference to the fact previously it had been determined from several sources. One of the sources would be microphone surveillance; that a given named individual had been associated with Mr. Black, because this was my area of investigation ... Consequently, the course of my information ... would be from several sources including microphone surveillance and it would become commingled with other information. My purpose in sending leads out in the first place would be to identify individuals which I have no identity for or I wanted to get additional background ... so it would be a situation where I would be anxious and interested."

In addition, there is no getting around the fact that the activities of the law enforcement agencies constituted a clear and unequivocal violation of a federal statute, namely, title 47 U.S.C. Sections 605 and 501; *Lee* v. *Florida*, 392 U.S. 378.

In *Nardone* v. *United States*, 308 U.S. 338, the Court made it clear that not only was direct evidence of electronic surveillance to be suppressed, but "fruit of the poisonous tree" doctrine also required that all indirect evidence obtained must also be barred. Thus in the *Nardone* case, the Court explained:

> "To forbid the direct use of methods ... but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'."

The argument is further bolstered by the opinion in the *Lee* case where the Court further held:

> "But the decision we reached today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. Elkins v. United States, 364 U.S. 206, 222 . . . Under our Constitution, no Court, State of federal, may serve as an accomplice in the wilful transgression of the 'laws of the United States', laws by which 'the Judges in every State (are) bound. . . .'"

It is therefore quite manifest that the only way that the Court could have enforced these mandates was by preventing the prosecution altogether, that is, to have eliminated itself as an accomplice in the commission of the federal crime which had undoubtedly been perpetrated by the law enforcement authorities.

This Court should now grant certiorari and reverse the judgment in order to enforce the doctrine explained above.

POINT II

Inordinate pretrial publicity permeated the pre-trial atmosphere in this case and it was error, as a matter of law, reaching constitutional dimensions for the trial court to have denied a continuance.

Prior to trial, there had been substantial publicity which, it is submitted, precluded a fair trial. This publicity dealt not only with the generic subject of the meat industry, but specifically referred to fraudulent and criminal practices involving at least one or more of the witnesses who were later to testify at this very trial.

In addition to that fact, the Court also was shown a number of the articles and was asked to grant a continuance in order to ameliorate and attentuate the virulence of this publicity. (The records of the State Court confirm the fact).

The cases are legion that such a trial atmosphere precludes fair and impartial consideration of the facts by a trial jury.

On a number of occasions, the Courts have held that the only sensible and proper procedure to even attempt to reduce the damaging consequences of this publicity, is to adjourn the trial until things have "simmered down". A continuance was denied.

See *Sheppard* v. *Maxwell*, 384 U. S. 333;
Irvin v. *Dowd*, 366 U. S. 717;
Estes v. *Texas*, 381 U. S. 532; and
Rideau v. *Louisiana*, 373 U. S. 723.

We would ask this Court to also review this aspect of the case as raising a Federal Constitutional question.

Under the circumstances, it is submitted that a fair trial was impossible.

POINT III

The petitioners herein were convicted of violating Section 850 of the New York Penal Law. The only evidence, however, admissible against them established a violation of Section 380(2) of the Penal Law and accordingly, the conviction, resting upon no competent evidence, is unconstitutional.

The petitioners herein were charged with the violation of New York statute forbidding extortion, namely, Section

850 of the Penal Law. In order to convict them of this crime, the District Attorney was required to establish that the money alleged to have been paid herein, was paid under the compulsion of "force or fear". This, it is submitted, the District Attorney was unable to do since it is undisputed that the alleged "force or fear" employed herein was that no contract between management and the Union would be approved by the Union until the money was actually paid.

The Union itself, approved the agreement by a vote of about 4,000 to 6 on June 9, 1964.

It was only *after* the approval of the contract by this overwhelming majority of the Union, that any money whatsoever was paid to the petitioners by the management committee or any of the members thereof.

The District Attorney may have proved that a "bribery" was committed under Section 380(2), but in the case of bribery, the "victims" are accomplices as a matter of law and therefore, pursuant to Section 399 of the Code of Criminal Procedure, no conviction would be possible herein, since there was no independent corroborating evidence to satisfy the mandates of Section 399 of the Code of Criminal Procedure. (See *People* v. *Feld*, 262 App. Div. 909; *People* v. *Dioguardi*, 8 N.Y. 2d 260; *Nick* v. *United States*, 122 F. 2d 660, 671 (8th Cir. 1941)).

The District Attorney admittedly used substantial electronic surveillance in this case but could not introduce this for corroborative purposes since it obviously would have constituted the commission of a Federal crime to have done so. (*Lee* v. *Florida, supra*.).

Accordingly, the District Attorney apparently decided to prosecute on the theory of extortion (Section 850 of the

Penal Law), since the victim of an extortion is not an "accomplice". The facts however, do not support this theory because no payment could have been made under the "force or fear that no contract would be approved", since *no payments* were made *until after* the Union had already approved the contract.

The convictions therefore violated due process of law under the Fourteenth Amendment because they are of insufficient factual foundation. (*Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Thompson* v. *Louisville*, 362 U.S. 199, 80 A.L.R. 2d 1355; *Johnson* v. *Florida*, 391 U.S. 596.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted:

IRVING ANOLIK,
ABRAHAM H. BRODSKY, and
HAROLD KRIEGER
Attorneys for Petitioners

Of Counsel
IRVING ANOLIK,
ABRAHAM H. BRODSKY,
KRIEGER, CHODASH & POLITAN

APPENDIX A

Certificate Denying Leave

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,
Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

—against—

KARL MULLER, FRANK KISSEL and HARRY STUBACK,
Defendants-Appellants.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
May 5th, 1970

ADRIAN P. BURKE
Associate Judge

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

June 22, 1970.

Irving Anolik, Esq.,
225 Broadway,
New York, N. Y. 10007
Dear Mr. Anolik:

Re: People v. Carl Muller,
Henry Stuback and Frank
Kissel

I hereby deny your application for reargument and reconsideration of your application for leave to appeal in the above entitled matter. I considered your argument that the case involved a federal constitution question.

Very truly yours,

ADRIAN P. BURKE
Associate Judge

APPENDIX C

Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of March, 1970.

Present:

HON. SAMUEL W. EAGEN,
Justice Presiding.

HON. LOUIS J. CAPOZZOLI,
HON. OWEN McGIVERN,
HON. EMILIO NUNEZ,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

KARL MULLER, FRANK KISSEL, and HARRY STUBACK,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County rendered on April 16, 1969, convicting him of conspiracy as a Felony [Penal Law §§ 580-a and 850], Extortion (9 counts) [Penal Law § 850] and Attempted Extortion (2 counts) [Penal Law §§ 2 and 850], and said appeal having been argued by Mr. Irving Anolik, and Arnold Stream, of counsel for the appellants, and by Mr. Peter F. Schwindt, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

Clerk.

PREME COURT, U. S.

FILED

SEP 5 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 510

CARL MULLER, FRANK KISSEL and HARRY STUBACK,

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against

THE STATE OF NEW YORK,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) RE 2-7300

MICHAEL R. JUVILER
PETER F. SCHWINDT
Assistant District Attorneys
Of Counsel

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

Petitioners Muller, Kissel and Stuback are seeking a writ of certiorari to the New York Supreme Court, Appellate Division, First Department, which unanimously and without opinion affirmed, by order of March 24, 1970, judgments of the Supreme Court of the State of New York, County of New York [GELLINOFF, J. and a jury], rendered April 16, 1969, convicting each of them, after trial, of CONSPIRACY AS A FELONY [Penal Law §§480-a and 850], EXTORTION (9 counts) [Penal Law §850] and ATTEMPTED EX-

TORTION (2 counts) [Penal Law §§2 and 850]. Karl Muller was sentenced to twelve concurrent State Prison terms of not less than three nor more than six years, and Frank Kissel to three State Prison terms of not less than three and one-half nor more than seven years and nine terms of not less than seven and one-half nor more than fifteen years, all sentences to run concurrently. Harry Stuback received three State Prison terms of three and one-half to seven years and nine terms of five to ten years, all to be served concurrently.

The Court of Appeals of the State of New York, per BURKE, J., denied petitioners' motions for leave to appeal on May 5, 1970, stating "there is no question of law presented which ought to be reviewed by the Court of Appeals."

Introduction

In late April 1964, the pork producers of New York City, some 35 to 40 in number, were advised by Local 174, Amalgamated Meat Cutters and Butchers Union, which represented their production employees, of labor's demands for a new collective bargaining agreement to become effective at the expiration of the old contract in mid-June. Shortly, having already warned the packers that a new agreement had to be reached by June 15th, the defendants, officers of the local, demanded $60,000 for themselves or there would be no contract at all. When no amount of protest availed, the members of the Labor Negotiating Committee of the Meat Trade Institute, which represented the producers, agreed. Thereafter, following ac-

ceptance by both sides of a contract which all agreed was a major union victory, but before formal signing, various packers turned over to each of the defendants varying sums of money totaling in excess of $44,000.

Accordingly, in 1967—the defendants had been successful enough to keep their victims quiet for a long while—the defendants were indicted by a New York County Grand Jury for the crimes of conspiracy to extort (Count 1) and extortion (Counts 2-14), the separate extortion counts charging the defendants with separate and distinct extortions from 13 different firms and their officers. Tried before Mr. Justice GELLINOFF and a jury in the late winter of 1969, the defendants were found guilty as charged under counts 1-3, 5-7 and 9-12, and guilty of attempted extortion under counts 4 and 8; counts 13 and 14 were not sent to the jury.

THE EVIDENCE AT TRIAL

The People's Case

The butchers union serves its demand for a new contract and the defendants refuse to extend the old contract pending the outcome of negotiations.

On June 15, 1964 three-year collective bargaining agreements between the Amalgamated Meat Cutters and Butchers Union, Local 174, and numerous pork processors located in New York City were to expire (Levy 231-2; Katz 415; Frunz 619-20; White 542-3). Accordingly, the union presented its notice of demands to the employers and on April

* Numbers preceded by names in parentheses are, unless otherwise indicated, references to page numbers prefixed by the letter "A" of the printed record on appeal.